IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 749 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

==========

SURESHBHAI JEHAJI THAKOR
Versus
THE STATE OF GUJARAT AND ANOTHER

==========

Appearance :
MR BS SUPEHIA for the Petitioner
MR HL JANI, ADDITIONAL PUBLIC PROSECUTOR for Respondent No.1
None for Respondent No.2

==========

CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 29/01/2007

ORAL JUDGMENT

1. Petitioner – original accused is aggrieved by judgment and order dated 13.10.2006 passed by the learned Additional Sessions Judge, Patan in Criminal Appeal No.39

of 2002, whereby the learned Additional Sessions Judge was pleased to confirm the judgment and order passed by the learned Judicial Magistrate First Class, Siddhpur (“JMFC”, for short) in Criminal Case No.1317 of 1989 dated 12.04.2002. The learned JMFC convicted the present petitioner for an offence under Section 7(1) of the Prevention of Food Adulteration Act, 1954 (“the Act”, for short) and was pleased to award 2 years R.I., fine of Rs.1,000/- and in default, 2 months R.I. Under Section 16(1) of the Act.

2. Mr.B.S.Supehia, learned Advocate for the petitioner vehemently argued that the judgment and order passed by the learned JMFC, Siddhpur, confirmed by the learned Additional Sessions Judge, Patan is contrary to law and requires to be quashed and set aside in light of the fact that under Section 16A of the Act, offences under sub-section (1) of Section 16 of the Act are to be tried in a 'summary way' by a Judicial Magistrate of the first class, who is specially empowered in this behalf by the State Government. He submitted that second proviso to Section 16A of the Act reads as under:

> “..... when at the commencement of, or in the course of, a summary trial under this section it appears to the magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding

> one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code'.

The learned Advocate for the petitioner submitted that he has perused the Record and Proceedings of the Courts below, which was called for and is received. The learned Advocate submitted that he did not find any order contemplated under the aforesaid proviso to Section 16A. He submitted that thus, there is no order recording that, 'it is undesirable to try the case summarily'. The learned Advocate submitted that in absence of such order, the learned JMFC could not have tried the case as a warrant triable and therefore, the judgment and order passed by the learned JMFC are not in accordance with law and the same could not have been confirmed by the learned Additional Sessions Judge.

3. The learned Advocate for the petitioner when asked to place a 'notification', by which the State Government has specifically empowered a Judicial Magistrate of the first class to try of the offence under sub-section (1) of Section 16 of the Act in a summary way in the district of Patan or erstwhile district of Mehsana, the learned

Advocate expressed his inability to produce any such notification.

In absence of any such notification, this argument is not acceptable and hence, this submission is rejected.

Besides, Chapter XXXV of the Code of Criminal Procedure (“Code”, for short) provides for, Irregular Proceedings. Section 460 of the Code enumerates, irregularities which do not vitiate proceedings, whereas, Section 461 of the Code enumerates, irregularities which vitiate proceedings.

Section 461 of the Code says that:

> “If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-
>
> “(a) to (l).....
>
> (m)tries an offender summarily ;, his proceedings shall be void.”

Vise versa, it is not provided that an offender, who was to be tried summarily, is tried by warrant triable process, can be said to have been vitiated on that ground and therefore, the submission of the learned Advocate for the petitioner is found without any substance and hence, it is rejected.

4. The learned Advocate for the petitioner vehemently submitted that in the present case, the case of the prosecution is that the milk, of which the sample was taken, was found to be adulterated, but then, the milk was adulterated by adding water only. He submitted that 'adding water' is not something which can be termed as, 'injurious to health' and therefore, the matter requires consideration.

The learned Advocate for the petitioner invited attention of the Court to the term, 'adulterated' contained in Clause (ia) of Section 2 of the Act, which says:

> “adulterated” - an article of food shall be deemed to be adulterated-
>
> (a) to (l) .....
>
> (m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health:
>
> .....”

The learned Advocate for the petitioner submitted that in the present case, in the report of the public analyst, which is at Exh.58 it is stated that the milk

fat was only 2.3% against the minimum required 4.5%. Similarly, 'milk solids not fat' was found to be 7.6% against the minimum required 8.5%. He submitted that there is nothing in the report to show that the sample was found to be 'injurious to health'. He submitted that the Courts below did not bear this aspect in mind while recording conviction and awarding sentence.

5. The learned Advocate for the petitioner submitted that the penalties prescribed under the Act are in Section 16. Provisions contained in Section 16 of the Act reads as under:

> "Subject to the provisions of sub-section (1A) if any person-
>
> (a)whether by himself of by any other person on his behalf, imports into India or manufactures for sales or stores, sells or distributes any article of food-
>
> (i)which is adulterated within the meaning of sub-clause (m) of clause (ia) of section 2 .....
>
> (ii).....
>
> (b) to (g) .....
>
> he shall, in addition to the penalty to which he may be liable under the provisions of section 6, be punishable with imprisonment for a term which shall

not be less than six months but which may extend to three years, and with fine which shall not be less than one thousand rupees:"

The learned Advocate for the petitioner submitted that sub-clause (i) of Clause (a) of sub-section (1) of Section 16 of the Act provides that, when an article of food, is adulterated, within the meaning of sub-clause (m), punishment prescribed is only 6 months, which may extend to 3 years. The learned Advocate submitted that therefore, the sentence imposed in the present case is unjust being unreasonable.

6. The learned Advocate submitted that when the offences under the Act are to be tried by 'summary' trial in view of the provision of sub-section (2) of Section 262 of the Code of Criminal Procedure ("Code", for short), sentence of imprisonment for a term exceeding 3 months cannot be imposed.

7. Mr.H.L.Jani, learned Additional Public Prosecutor invited attention of the Court to Section 16A of the Act. The learned Additional Public Prosecutor emphasized on the following words of the Section:

"shall, **as far as may be, apply to such trial**:."

The Learned Additional Public Prosecutor submitted

that Sections 262 to 265 of the Code are made applicable, 'as far as may be' meaning thereby that they are not to be applied in a manner so as to negate the provisions of Section 16A of the Act.

As discussed hereinabove, Section 16A of the Act has no application to the facts of the case. The Learned Additional Public Prosecutor submitted that the learned Advocate for the petitioner has not pointed out any notification issued by the State Government, 'specially empowering the Judicial Magistrate of the first class to try all offences under sub-section (1) of Section 16 of the Act in a summary way'. In absence of such notification, the submission is of no significance and liable to be rejected.

8. The learned Advocate for the petitioner next submitted that there is non-observance of Rule 14 of the Prevention of Food Adulteration Rules, 1955 (“Rule”, for short), which is mandatory in character. E submitted that once Rule 14 is not followed, the conviction recorded by the learned JMFC confirmed by the learned Additional Sessions Judge cannot be sustained and be quashed and set aside. Rule 14 of the Rules reads as under:

“Manner of sending sample for analysis.-Samples of

> food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation or in the case of dry substance, entrance of moisture and shall be carefully sealed."

The learned Advocate for the petitioner submitted that in the present case, it is on record that in the cross-examination, the complainant – Jayantilal Dwarkadas Patel, the Food Inspector of Siddhpur Nagarpalika has stated that, 'the glass bottles in which samples were collected were not cleaned on the spot, in presence of the panchas'.

The learned Advocate for the petitioner vehemently submitted that in absence of the clinching evidence to the effect that the bottles were cleared, the learned JMFC ought to have held that there is non-compliance of Rule 14 of the Rules and it being mandatory in character, 'non-compliance' shall result into 'acquittal' of the petitioner.

9. Mr.Jani, learned Additional Public Prosecutor invited attention of the Court to paragraph No.10) of the judgment of the learned JMFC. In paragraph No.10), the learned JMFC has recorded in terms that, from the deposition of the complainant – Food Inspector, Shri

Patel – Exh.45, it is clear that the deponent had purchased 700 ml milk in a stainless steel container, which was clean, dry and without any moisture, which was then poured in 3 clean, dry bottles having no moisture, no colour or no ondour.

10. The learned Advocate for the petitioner submitted that this particular assertion by the Food Inspector – complainant is not sufficient and the prosecution must bring home this fact not only by getting it corroborated by the evidence of the helper of the Food Inspector but also by the evidence of an independent witness.

In the present case, the learned JMFC has recorded that, 'the said fact is corroborated by the helper – Natarwarbhai Vaghela and in addition to that, this fact is supported by panch witness – Rasikbhai Prajapati in his deposition at Exh.120'.

11. In view of the aforesaid categorical finding recorded by the learned JMFC, which is verified from the relevant depositions, the submission of the learned Advocate for the petitioner is found without any substance. The decisions cited by the learned Advocate for the petitioner in support of the aforesaid submission in the matter of **STATE OF GUJARAT VS. PUNABHAI RAMABHAI MACHHI**, reported in 2005(2) FAC 145 and in the matter of

C.D.PATEL, FOOD INSPECTOR VS. POPATLALJIVAJI THAKOR, reported in 2005(1) FAC 46 are of no help to the petitioner.

It is a settled position that until a case is made out on facts about the breach of a mandatory provision, a decision to the effect that, “non-compliance of mandatory provisions of Rule 14 is to 'entail acquittal”, is of no help to the present petitioner.

12. The learned Advocate for the petitioner next submitted that there is non-compliance of Rule 16(c) of the Rules. Rule 16(c) reads as under:

> “A paper slip of the size that goes round completely from the bottom to top of the container, bearing the signature and code and serial number of the Local (Health) Authority, shall be pasted on the wrapper, the signature or the thumb impression of the person from whom the sample has been taken being affixed in such a manner that the paper slip and the wrapper both carry a part of the signature or thumb impression:
>
> Provided that in case, the person from whom the sample has been taken refuses to affix his signature or thumb impression, the signature or thumb impression of the witness shall be taken in the same manner;”

The learned Advocate for the petitioner relied upon

a decision of the Division Bench of this Court in the matter of **STATE OF GUJARAT VS. KESHAVLAL KALIDAS AND ANOTHER**, reported in 21(2) GLR 26.

The learned Advocate for the petitioner could not point out as to how this decision will be applicable to the facts of the present case. On careful consideration, this Court finds that the above decision has no application to the facts of the case on hand, inasmuch as, the learned JMFC has rightly recorded in paragraph No.10) of the judgment and order that the evidence of the Food Inspector – complainant is not only supported by evidence of the helper – Natwarbhai Vaghela but is also supported by panch witness – Rasikbhai Prajapati – Exh.120.

The learned Advocate for the petitioner invited attention of the Court to Exh.106 – panchnama, wherein the prescribed procedure for collecting the sample was followed as described. The learned Advocate for the petitioner could not convince this Court that the panchnama depicts that, 'there was non-compliance of Rule 16(c) of the Rules'. Hence, the submission of the learned Advocate for the petitioner is rejected.

13. The learned Advocate for the petitioner next relied upon a decision of this Court in the matter of **STATE VS.**

BHAGUBHAI RAMJIBHAI, reported in 23(2) GLR 624 contending that, 'feezing point test' was not carried out in the present case and as is held by this Court in the aforesaid decision, it is the duty of the State to see that the analysis of the sample is carried out in perfect manner, in absence of which, the conviction cannot be sustained.

In the present case, neither before the learned JMFC nor before the learned Additional Sessions Judge this contention was raised. In absence of that, the plea about non-carrying out of the feezing point test, cannot be accepted.

14. The learned Advocate for the petitioner next relied upon a decision of this Court in the matter of **THE STATE OF GUJARAT VS. BALDEVDAS PRATAPDAS SADHU**, reported in 1980 Cr.L.R. (Guj.) 16.

Without verifying for himself as to whether the said decision is applicable to the facts of the case on hand, the learned Advocate for the petitioner cited the same and submitted that, in that case, this Court had held that, 'imprisonment for 1 day is insufficient and the same was enhanced to 1 month's imprisonment'. The learned Advocate submitted that assuming without admitting that the case is proved against the present

petitioner, he should have been awarded only 1 month's imprisonment. He submitted that in the case on hand, the accused – petitioner has already undergone 2 months imprisonment by now, hence, the sentence should be modified and the petitioner should be released from the jail.

This is a unique method of arguing a case. Without pointing out the similarity of facts of the two cases, a decision is cited and parity is claimed. In the present case, the learned JMFC, on appreciation of the facts of the case, has awarded 2 years R.I. and the learned Advocate is not able to convince this Court on the point that it is not proper and the same should be reduced to the imprisonment of 1 month.

Having found no substance in this contention, the same is rejected.

15. Learned Additional Public Prosecutor, Mr.Jani invited attention of the Court to the aspect reflected from the deposition of the complainant – Food Inspector – Exh.45, wherein on 19.11.1998 it is recorded that, 'the accused had filed an application Exh.67 stating that he has no objection if the charge is framed'.

The learned Additional Public Prosecutor submitted

that this is a case, wherein consent is given by the petitioner – original accused for framing of the charge on 19.11.1998. Now to contend that the accused – petitioner is denied the 'summary trial' as contemplated under Section 16A of the Act is advanced only with a view to see that the things are confused and undue sympathy is invoked.

16. Learned Additional Public Prosecutor, Mr.Jani submitted that the offence is under Section 7 of the Act, which prohibits manufacture, sale, etc. of certain articles of food. The learned Additional Public Prosecutor submitted that Section 16(1) of the Act provides for penalties and not the independent offence and therefore, the claim of the learned Advocate for the petitioner that Section 16A of the Act entitles the petitioner for 'summary trial', is misplaced. The learned Additional Public Prosecutor submitted that the learned JMFC has recorded that, 'for the offence under Section 7(1) of the Act, punishment provided under Section 16A of the Act, is imposed and therefore, accused ought to have been tried by summary trial', is misplaced and misconceived and hence, rejected.

17. The learned Additional Public Prosecutor submitted that beside there is acquiesce on the part of the

petitioner, or in other words, there is inaction on the part of the petitioner. The learned Additional Public Prosecutor submitted that under sub-section (2) of Section 13 of the Act, the accused is duty bound to make an application to the Court within 10 days from the date of the receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analyzed by the Central Food Laboratory. The learned Additional Public Prosecutor submitted that in the present case, the accused – petitioner has not chosen to exercise that right and that being so, the report of the public analyst – Exh.58 is final and therefore, the conviction recorded is legal and proper.

18. The learned Additional Public Prosecutor submitted that this is a case, wherein the learned JMFC has taken all pains to appreciate and analyse the evidence on record and has then recorded the findings, which are not disturbed by the learned Additional Sessions Judge. Thus, it is a case of concurrent findings recorded by the Court below. He submitted that the revision application is without any substance, hence deserves to be rejected.

19. Having heard the learned Advocate for the petitioner, the learned Additional Public Prosecutor and having perused the record, the Court finds no substance

in this revision application. Hence, it is dismissed. Rule is discharged.

(RAVI R.TRIPATHI, J.)

*Shitole